MCI Telecommunications Corporation

MCI

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Washington, DC 20006

ORIGINAL

February 12, 1999



Ms. Magalie R. Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

**Re: In the Matter of Petition of Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell for Expedited Declaratory Ruling on Interstate IntraLATA Toll Dialing Parity or, in the Alternative, Various Other Relief, CC Docket No. 96-98, NSD File No. L-98-121**

Dear Ms. Salas:

Enclosed herewith for filing are the original and four (4) copies of MCI WorldCom's Reply to SBC's Opposition to the Emergency Motion to Dismiss.

Please acknowledge receipt by affixing an appropriate notation on the copy of the MCI WorldCom Reply furnished for such purpose and remit same to the bearer.

Sincerely yours,

Henry G. Hultquist

Enclosure
HGH

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**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, DC 20554**



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| In the Matter of: | ) | |
| | ) | |
| Petition of Southwestern Bell Telphone | ) | NSD File No. L-98-121 |
| Company, Pacific Bell, and Nevada Bell for | ) | |
| Expedited Declaratory Ruling on Interstate | ) | CC Docket No. 96-98 |
| IntraLATA Toll Dialing Parity or, in the | ) | |
| Alternative, Various Other Relief | ) | |
| MCI WorldCom, Inc., Emergency | ) | |
| Motion to Dismiss | ) | |

## MCI WORLDCOM, INC. REPLY TO OPPOSITION TO EMERGENCY MOTION TO DISMISS

According to Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell ("SBC"), the Federal Communications Commission ("Commission") should not dismiss its petition in light of the Supreme Court's recent decision in *AT&T Corp. v. Iowa Utility Board*, 1999 WL 24568 (U.S.). In a desperate attempt to continue to delay the provisioning of intraLATA dialing parity, SBC elevates routine, ministerial acts of the federal court system to substantive rules of law, ignores valid and existing Commission rules that require immediate deployment of toll dialing parity, and erroneously asserts that the Commission will be somehow forced to rewrite its rules, even though there is no policy or legal reason to do so. SBC is in an apparent state of denial. The Supreme Court has spoken. The Commission's dialing parity rules will soon apply again to intrastate calls. And, SBC will be out of compliance in all states in its

region. Rather than taking steps to work with state regulators to quickly bring itself into compliance, it is choosing -- once again -- to litigate, not compete. SBC's arguments are without legal or factual merit. The Commission should dismiss SBC's petition for relief, and order SBC to comply with all federal dialing parity rules. Customers should not be denied the benefits of 1+ competition in intraLATA toll markets for one moment longer than is absolutely necessary.

## I. Rule 45 Of The Supreme Court's Rules Does Not Save SBC's Petition From Mootness

SBC's petition sought to avoid the Commission's implementation requirements for interstate intraLATA toll dialing parity. In essence, SBC asserted that it would be overly burdensome to implement intraLATA toll dialing parity for interstate calls, prior to intrastate implementation. The implementation dates diverged because the 8th Circuit Court of Appeals had previously held that the Commission lacked jurisdiction to impose a deadline for intrastate implementation.[1]

In *AT&T Corp.*, the Supreme Court held that the 8th Circuit erred. According to the Court, "we reverse the Court of Appeals determinations that the Commission had no jurisdiction to promulgate rules regarding . . . dialing parity."[2] The Court went on to state that "since the provision addressing dialing parity, § 251(b)(3), does not even mention the States, it is even clearer that the Commission's § 201(b) authority is not superseded."[3] However, according to SBC, the fact that, pursuant to Rule 45 of the Supreme Court's rules, the Court's certified

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[1] *People of the State of California v. FCC*, 124 F.3d 934 (8th Cir. 1997).

[2] *AT&T Corp.* at 7.

[3] *Id.* at 8.

judgment will not be sent to the Court of Appeals before February 19, 1999, means that "*nothing* has changed to render the SBC LEC's original petition moot or inapplicable," (emphasis added).[4]

Of course, this is absurd. A great deal has changed. Prior to the Supreme Court's decision, the Commission was confronted by the possibility that a State might interpret the Act to permit delay in implementation of intrastate toll dialing parity beyond February 8, 1999. In the wake of the Supreme Court's decision, such an interpretation could not stand against the Commission's determination that § 251(b)(3) of the Act requires implementation no later than February 8, 1999.[5]

SBC's original request for relief rests entirely on the assumption that the states have discretion to delay implementation of intrastate toll dialing parity beyond February 8, 1999. There is no longer any reason to debate the merits of this argument.[6] The Supreme Court has made clear that the Commission has jurisdiction to implement rules regarding dialing parity. The Commission has already determined that the Act requires implementation no later than February 8, 1999. No Court can disturb this interpretation unless it finds it unreasonable.[7] Its

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[4] In the Matter of Petition of Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell for Expedited Declaratory Ruling on Interstate IntraLATA Toll Dialing Parity or, in the Alternative, Various Other Relief, CC Docket No. 96-98, File No. NSD-L-98-121, *Opposition of Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell to MCI's Emergency Motion to Dismiss* (filed February 8,1999) ("SBC Opposition") at 2.

[5] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, *Second Report and Order*, 11 FCC Rcd 19392 (1996) ("Second Report and Order"), at ¶ 59.

[6] MCI WorldCom has consistently maintained that § 251(b)(3) does not permit such delay.

[7] *See, e.g., Chevron U.S.A., Inc. v. Natural Resources Defense Coucil, Inc.* 467 U.S. 837, 843 (1984).

reasonableness cannot be doubted. Indeed, 11 states independently reached the same conclusion *before* the Supreme Court's decision, and the BOCs themselves pressed this interpretation as recently as 1996.[8] More importantly, SBC cannot now challenge these rules. SBC has already filed its preenforcement challenge. That challenge went only to specific jurisdictional issues, not to the merits of the rules. SBC does not get to invent endless arguments regarding the validity of these rules. This matter is *res judicata* for SBC.

Supreme Court Rule 45 cannot save SBC's request for relief. There is no longer even a colorable basis for granting that request. There can be no reason to delay the implementation of interstate toll dialing parity, since there is no basis on which a state could purport to delay intrastate implementation beyond February 8, 1999.

## II. Any Modifications That The Commission May Make To Its Rules Regarding Implementation Plans, Need Not Result In Implementation Delay Significantly Past February 8, 1999

SBC asserts that since the 8th Circuit's mandate will issue sometime after February 8, 1999, it will be impossible for BOCs to comply with the Commission's implementation schedule, which requires submission of an implementation plan to the state commission by August 12, 1998. SBC implies that the Commission will have to delay implementation significantly beyond February 8, 1999, in order to accommodate revised implementation plan deadlines. There is no factual basis whatsoever for this argument. The question is not whether February 8th is invalid because the Supreme Court reached a decision on January 25th. The question is how quickly can SBC

[8] *See, e.g.*, In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Ameritech comments at 19 (filed May 20, 1996).

and the other BOCs comply. The Commission can and should exercise its discretion in a complaint or order to show cause proceeding, in a case where a BOC is making best efforts to comply with its obligation. Facts indicate that implementation can be done quickly.

As several State Commissions have recognized in recent days, the BOCs can implement intraLATA toll dialing parity on fairly short notice. For example, parties informed the Tennessee Regulatory Authority on February 2, 1999 that they had reached an agreement on the terms and conditions of BellSouth's implementation plan. A Pre-Hearing Conference was held on February 5th, at which minor changes were recommended to the Revised Plan. The Second Revised Plan was approved by the Directors of the Authority on February 8, 1999, allowing for implementation that same day.[9] SBC can easily do likewise.[10] Failure to do so shows not that lengthy delay is needed, but that SBC will resist the introduction of competition into its monopoly markets for as long as it can get away with it.

The Commission should take whatever steps are necessary to allow implementation to proceed as quickly as possible. SBC and other BOCs can implement dialing parity immediately, as shown in Tennessee, South Carolina and other states. Customer notification and other aspects of the implementation can follow, rather than precede technical implementation.[11]

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[9] *See* Petition of BellSouth Telecommunications, Inc. For Approval of an IntraLATA Toll Dialing Parity Implementation Plan, *Second Revised IntraLATA Toll Dialing Parity Plan*, February 8, 1999 Implementation Date.

[10] If the Commission finds it necessary to waive or modify any of its dialing parity rules, it should focus on rules that would unnecessarily delay implementation.

[11] Interexchange carriers will of course engage in customer education efforts as soon as they can accept and process customer orders.

## III. The Commission Has Already Determined That The Statute Requires Implementation by February 8, 1999

Ultimately, SBC argues that upon remand from the 8th Circuit Court of Appeals, "the Commission will have to consider for the first time whether it has statutory authority to require the Bell companies to comply with a national deadline for implementing intrastate intraLATA dialing parity."[12] SBC then presents a tortured argument that the Commission lacks such authority under § 251(d)(3). SBC is wrong as a matter of fact and law. The Commission has already determined that in passing the Act, Congress required implementation by February 8, 1999.[13] The Supreme Court decided that the Commission had jurisdiction to make this determination. And § 251(d)(3) cannot save a state interpretation to the contrary. A close examination of SBC's argument illustrates why it must fail.

SBC maintains, in effect, that § 271(e)(2)(B) constitutes a grant of authority to the states, and that it permits, but does not require them to order a BOC to implement intrastate toll dialing parity, after February 8, 1999, but before the BOC obtains interLATA authority. SBC then argues that § 251(d)(3) protects state action taken pursuant to the authority granted in § 271(e)(2)(B), against Commission action to contrary.[14] According to SBC, the Commission may not impose an implementation deadline that differs from the deadline required by a state, if the

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[12] SBC Opposition at 3.

[13] Second Report and Order at ¶ 59.

[14] According to that section: in prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that -- (A) establishes access and interconnection obligations of local exchange carriers; (B) is consistent with the requirements of this section; and (C)does not substantially prevent implementation of this section and the purposes of this part.

state's rule is consistent with the requirements of § 251, and would not substantially prevent the implementation of § 251 or of Part II of the Act.[15] This argument falls apart at every seam.

Section 271(e)(2)(B) is explicitly a limitation on state authority, not a grant of authority. Prior to the enactment of the Act, the states had unquestioned authority to require BOCs to implement intrastate dialing parity. This section disables states, in certain circumstances, from requiring such implementation prior to the earlier of BOC interLATA entry, or February 8, 1999. It does not give states authority to delay implementation further once the earlier of these dates has passed. Since § 271(e)(2)(B) does not grant such authority to the states, there is no basis on which a state could purport to permit delay in implementation. Thus, § 251(d)(3) is irrelevant since the states lack discretion to delay toll dialing parity beyond February 8, 1999.

Moreover, even if the Commission were to engage in a § 251(d)(3) analysis, it would have to reject any delay in implementation past February 8, 1999. Section 251(b)(3) requires all LECs to implement dialing parity. Section 271(e)(2)(B) prohibits certain states from requiring BOC implementation of intraLATA dialing parity consistent with § 251(b)(3) until the earlier of two dates: BOC interLATA entry or February 8, 1999.[16] Further delay would necessarily be inconsistent with the requirements of § 251(b)(3), and would, by definintion, substantially prevent the implementation of that section, particularly since that section does not include § 271(e)(2)(B). Further delay would allow the BOCs to maintain their monopoly on the intraLATA toll market by continuing not to comply with the requirements of § 271. There is every reason to remove any

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[15] SBC Opposition at 4.

[16] Even if § 271(e)(2)(B), which is found in Part III of the Act, did grant authority to states, it would be irrelevant to any § 251(d)(3) analyis, since that section addresses consistency with § 251 and Part II, but does not mention Part III.

disincentive to such cooperation.

SBC would use § 251(d)(3) as a way to allow the states to interpret the Act according to their own lights, even with respect to §251(b)(3), which, as the Supreme Court observed, "does not even mention the states."[17] This is an wrongheaded interpretation of § 251(d)(3). That section must be read to prevent the Commission from preempting only certain state actions taken in areas where the states are authorized to act. Where, as here, Congress has limited state authority and explicitly required all LECs to implement dialing parity, a Commission interpretation that that includes toll dialing parity cannot be eroded by § 251(d)(3).

## IV. Conclusion

For the reasons stated above, SBC's Opposition provides no basis on which the Commission can grant the requested relief. The Commission should dismiss SBC's petition and order SBC to comply with all federal dialing parity rules.

Respectfully submitted,
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February 12, 1999

[17] *AT&T. Corp.* at 8.

## CERTIFICATE OF SERVICE

I, Vivian Lee, do hereby certify that on this12th day of February, 1999, copies of the foregoing Reply to Opposition to Emergency Motion to Dismiss were served on each of the following persons:

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